Supreme Court, U.S.
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No. 01-1754

IN THE
Supreme Court of the United States

RICHARD E. FOX,
Petitioner,
v.
RALPH COYLE,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After two rounds of briefing, it appears that the petition satisfies the customary criteria for granting review. It concerns "important question[s] of federal law," namely the jurisdictional time limits for seeking review of the partial denial of a certificate of appealability and the permissibility of using non-statutory aggravating factors to justify a capital sentence. It implicates a conflict in the lower courts over the permissibility of considering unadjudicated crimes during a capital-sentencing hearing. And it addresses questions both procedural and substantive that are recurring in nature, impact potentially all habeas litigants and in the end demand prompt resolution. The petition should be granted.

1. At no point does respondent raise, or even hint at, a procedural obstacle to reviewing the questions presented. No jurisdictional impediments exist, a final appealable order is in place, and there is no suggestion that Mr. Fox has waived or otherwise lost any of his arguments. Respondent's main point, it turns out, is that the decisions of the Sixth Circuit and Ohio Supreme Court are correct, a position that deserves the Court's full attention and consideration but not, we submit, until review has been granted.

2. Nor does respondent disagree with Mr. Fox over his interpretation of the procedures for seeking this Court's review of a circuit court's denial of a COA on some (but not all) issues. As set forth in his petition, Mr. Fox reads 28 U.S.C. § 2253(c) (requiring that an inmate receive a COA before appealing the denial of habeas relief) and 28 U.S.C. § 2101(c) (90-day deadline for filing a writ of certiorari) to mean that the jurisdictional time limit for filing a petition seeking review of any issue raised in a COA, including one for which a COA is denied, begins to run only after the appellate court's decision on the issues that it did agree to hear. At the same time, a plausible reading of these provisions and others suggests that a habeas litigant must seek this Court's review of the denied COA issues within 90 days of the final denial. Respondent, to its credit, agrees with Mr. Fox's reading of

these relevant provisions and does not dispute his interpretation. (*See* Resp. 5 ("we agree that habeas petitioners should raise any challenge to a circuit court's denial of a [COA] at just the time that Fox himself has chosen to raise his").)

3. Having agreed with Mr. Fox about the proper outcome of this unresolved and frequently recurring jurisdictional question, respondent nonetheless suggests that the parties' consensus means there is "no need for the Court to address that issue." Nothing could be further from the truth. Parties of course may not consent to the Court's jurisdiction where there is none. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) ("[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it."). Nor has the Court hesitated in the past to grant review of jurisdictional and other recurring federal questions merely because the parties agreed about the proper outcome. In *Hohn v. United States*, the Court agreed to resolve an open question on the Court's COA jurisdiction despite the fact that the "Government now found itself in agreement with [petitioner]," with "both [parties] argu[ing] in favor of our jurisdiction." 524 U.S. 236, 240-41 (1998); *see id.* ("The Government now found itself in agreement with Hohn, saying his claim was, in fact, constitutional in nature. . . . [S]ince Hohn and the Government both argue in favor of our jurisdiction, we appointed an *amicus curiae* to argue the contrary position."). *See also Becker v. Montgomery*, 532 U.S. 757, 762 n.1 (2001) ("Without any party to defend the Sixth Circuit's position, we invited Stuart A. Baker to brief and argue this case, as *amicus curiae*, in support of the judgment below."); *Dickerson v. United States*, 530 U.S. 428, 442 n.7 (2000) ("Because no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court, we invited Professor Paul

Cassell to assist our deliberations by arguing in support of the judgment below.").

4. The explanation the State of Ohio gives for finding common ground with Mr. Fox also does not diminish the importance of the question. That the State approvingly finds Mr. Fox's reading to be "prisoner-friendly," (Resp. 4), and to "give[ ] prisoners the maximum amount of time within which to seek review of a circuit court's refusal to grant a COA on some issues," (Resp. 5), is of course good news for Mr. Fox. But what of a less-prisoner-friendly State? The whole point of bringing this issue to the Court's attention is that the pertinent statutes and rules by their terms do not answer it—a matter of particular concern to first-federal-habeas litigants like Mr. Fox. As things now stand, a habeas petitioner in Mr. Fox's shoes has two options once the circuit court denies the petitioner's COA on some (but not all) issues. The petitioner could file a certiorari petition within 90 days of the decision. Or the petitioner could gamble that the 90-day clock does not begin to tick until the circuit court rules upon the issues it did agree to hear. In the face of this ambiguity, all but the most risk-embracing practitioners will file a petition within 90 days of the COA partial denial. That may perhaps be unnecessary, but today no one can say for sure, not even respondent, who does not disagree that the issue remains unresolved. Under these circumstances, what should a capital-inmate's lawyer do? Recommend a protective certiorari petition? Or recommend that the capital defendant take a chance and wait? And what for that matter may the clerk's office say? On this record, it would seem highly dangerous to recommend anything but a protective motion. Whether one considers the vantage point of habeas claimants, government defendants, or the Court itself, all stand to benefit from guidance regarding the issue's appropriate resolution.

5. The State takes a different tack when it comes to the substantive errors committed by the lower courts. Mr. Fox's first question (upon which the lower courts did not even grant

a COA) addresses the Ohio Supreme Court's remarkable decision to convert statutory mitigating evidence into non-statutory aggravating evidence, then to use that mitigating evidence to justify a capital sentence. (Pet. 10-12.) The state court reached its decision to impose the death penalty after weighing against Mr. Fox's chances for life the facts that he "faced few challenges and little adversity in his life compared with many others," (Pet. App. 111a), and suffered from a mental disorder that "undercut any prospect of successful rehabilitation." (*Id.*) Unlike the approach innovated by the Ohio Supreme Court, this Court requires that each mitigating factor be considered as a mitigator, not as an aggravator. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record"). Transforming mitigating evidence into non-statutory aggravators offends Eighth and Fourteenth Amendment principles—and that is particularly true of evidence of a mental disorder. *See Atkins v. Virginia*, 122 S. Ct. 2242, 2252 (2002) (barring use of the death penalty against the mentally disabled); *Stringer v. Black*, 503 U.S. 222, 237 (1992) ("[u]se of a vague or imprecise aggravating factor in the weighing process invalidates the sentence"); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (holding that where an "aggravating circumstance at issue in this case had been invalid . . ., due process of law would require that the . . . decision to impose death be set aside"); (*see also* Pet. 11-12).

Respondent, for its part, agrees that the state courts must "weigh all mitigating factors against the aggravating circumstances." (Resp. 2.) And it suggests the state courts did just that, noting that the "state supreme court gave Fox's 'steady employment, favorable character testimony and lack of a prior criminal record . . . only modest weight' as mitigating factors." (Resp. 3 (citing Pet. App. 111a).) But that reading of the Ohio Supreme Court's decision fails to

account for the court's next statements regarding the "little adversity" Mr. Fox faced as well as the fact that his mental disorder "undercut" his chances at rehabilitation. The court's error in weighing this mitigating evidence against Mr. Fox is not, as respondent suggests, rehabilitated by a state court's treatment of other mitigating evidence. While respondent is correct that "[n]othing in Ohio's laws—let alone in the Constitution—compelled the state supreme court to draw any particular conclusions about the mitigating evidence that Fox presented," (Resp. 3), that is beside the point. The point is, the Ohio Supreme Court impermissibly used this evidence.

6. Nor can one accept at face value respondent's contention that the "state trial court's opinion on that score is straightforward and unremarkable." (Resp. 2.) Recall, as an initial matter, that the trial court violated Ohio law by not explaining its weighing analysis in the opinion. (Pet. App. 106a ("The trial court's opinion in this case causes us to once again admonish trial courts to carefully comply with every specific statutory requirement in R.C. 2929.03(F)."). This required the Ohio Supreme Court to conduct its own independent reweighing, and ultimately is what led to the improper use of mitigating evidence. Indeed, other lower courts require a precise weighing of mitigating factors against aggravating factors, not a haphazard approach that twists one into the other. *See Williams v. Cain*, 125 F.3d 269, 282 (5th Cir. 1997) (In a weighing state, the sentencer must "place the statutory aggravating factors on one side of the scale and all of the mitigating evidence on the other, and . . . balance one side against the other before imposing the death penalty."); (Pet. 13-14).

Legal commentators also have been quick to point out that sentencers may, "and sometimes do, improperly weigh mitigating factors on the side of aggravation, altering the proper balance between aggravating and mitigating factors in a particular case and depriving defendants of what the United States Supreme Court has declared to be their constitutional

right to have each mitigating factor considered 'as a mitigating factor.'" Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 Hastings L.J. 409, 410 (1990); *see also* Note, *Mental Illness As An Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 304 (1989) ("[I]f a court allows mitigating mental illness evidence to aggravate the defendant's punishment, the aggravating factors will no longer fulfill their role of channeling sentence discretion. Aggravating factors are supposed to help a sentencer separate out criminals most deserving of death from offenders who are less culpable."). The decision warrants review or at a minimum the grant of a COA.

7. Petitioner's third question also goes largely unanswered by respondents. The Ohio Supreme Court, in authorizing Mr. Fox's death sentence, relied on the "manner in which [Fox] planned and executed the events that led to the kidnapping and murder." (Pet. App. 108a.) In that court's eyes, those circumstances included the "considerable effort and planning [that] apparently went into the kidnapping. Fox lured a vulnerable eighteen year-old girl to a remote country road. When she rejected his advances, Fox brutally stabbed her." (Pet. App. 110a-111a; *see also* Pet. 19-23.) By any measure, the decision to weigh these non-statutory aggravating factors against Mr. Fox's chance at life jeopardized the legitimacy of his death sentence. *See Barclay v. Florida*, 463 U.S. 939, 956-57 (1983).

Rather than resolving the constitutional tensions in the lower courts' decisions, respondent's brief serves only to highlight them. The State agrees (Resp. 6) that Ohio courts may not rely upon nonstatutory aggravating circumstances. But nothing in the State's capital sentencing statute allows for consideration of "planning and violence" on the side of aggravation. *See* Ohio Rev. Code § 2929.04. Yet that is exactly what the Ohio Supreme Court did.

If there is any doubt left as to the Ohio Supreme Court's improper approach to the weighing process, respondent's brief confirms it. In attempting to shore up its position, the State quotes an enlightening passage from the Ohio Supreme Court's decision regarding what factors may be considered in the weighing process: "[I]n an Ohio capital case [a sentencing court] 'may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.'" (Resp. 6 (quoting Pet. App. 108a).) That view, however, allows non-statutory aggravators to be weighed against the mitigators, something even respondent agrees "constitute[s] reversible error." And perhaps more importantly, it runs directly counter to the Ohio Supreme Court's subsequent decision in *Ohio v. Wogenstahl*, 662 N.E.2d 311 (Ohio 1996), where the Ohio Supreme Court recognized that its earlier decisions "might be construed to suggest that the nature and circumstances of the offense (such as the cruel and heinous manner in which it was committed) can be included on the aggravation side of the statutory weighing process." *Wogenstahl*, 662 N.E.2d at 322. In *Wogenstahl* the Ohio court rejected this construction, modified its previous decision, and declared that "the nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation." *Id.* (quoting Ohio Rev. Code § 2929.04(B)); (*see also* Pet. 20-23).

Instead of correcting the court's error in considering the nature and circumstances of Mr. Fox's crime, the Sixth Circuit compounded the mistake. In reviewing Mr. Fox's death sentence, the circuit court relied upon *Ohio v. Gumm*, 653 N.E.2d 253 (Ohio 1995), a pre-*Wogenstahl* decision. (*See* Pet. 20-22.) The Sixth Circuit called *Gumm* the Ohio Supreme Court's "most recent discussion of th[e] issue [presented in this appeal]," (Pet. App. 17a.), and said nothing about *Wogenstahl*, a subsequent decision that modified *Gumm*.

Respondent, too, ignores *Wogenstahl*. In fact, it almost entirely ignores Mr. Fox's discussion on this point. The State's bedrock conclusion, that "state and federal courts at every level have stated the law correctly," (Resp. 7-8), overlooks *Wogenstahl* and its pertinent teachings. (*Compare* Pet. App. 108a (court "may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors") (internal quotation omitted) *with Wogenstahl*, 662 N.E.2d at 322 ("nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation").) And it also overlooks the Sixth Circuit's failure to cite *Wogenstahl* or apply its teachings to the circumstances surrounding Mr. Fox's death sentence. The inconsistent—and in some places absent—analysis of the lower courts deserves review.

8. Respondent's citation (Resp. 7) to *Tuilaepa v. California,* 512 U.S. 967 (1994), does not change this analysis. There, the Court reviewed California's capital sentencing statute, which presents an exceedingly inapt analogy to Ohio's. California for example does not delineate which factors may be considered on the aggravating and mitigating sides of the scale. *See* Cal. Penal Code § 190.3 ("In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation and sentencer . . . ."). One of those factors, it turns out, is the "nature and circumstances of the present offense," *see id.*, something Ohio's weighing statute does not list as a statutory aggravator. Put simply, while a court may consider the nature and circumstances of a crime as an aggravator if the State's statute allows for it (California), it plainly may not do so when a State's weighing statute forbids it (Ohio).

9. Petitioner's final question also goes largely unrebutted, as does the deep conflict in the lower courts regarding it. As explained in the petition, the Ohio state courts

erred by considering the "Ritchey incident"—an uncharged, untried allegation—as an aggravating circumstance. (*See* Pet. 24-25.) The Ohio Court of Appeals, after reciting the facts of the Ritchey incident, concluded that the "aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt." (Pet. App. 143a.) The Ohio Supreme Court took the same approach, weighing the incident against Mr. Fox even though he "was not charged with any offense against Ritchey." (*Id.* at 108a.) In that court's mind, "the Ritchey offense was part of Fox's social history and background and reflected upon his character" and, it follows, could be weighed against his quest for life. (*Id.*)

Respondents do not, and cannot, deny that the state courts have issued conflicting decisions about whether a court may consider unadjudicated crimes during a capital-sentencing hearing. (*See* Pet. 25-29.) The issue has not gone unnoticed by this Court either. *See id.*; *see also Williams v. Lynaugh*, 484 U.S. 935, 937 (1987) (Marshall, J, dissenting from denial of certiorari and arguing that "[w]hether a State may introduce evidence of unadjudicated offenses in the sentencing phase of a capital trial is a vexing question with respect to which the state courts are in considerable need of guidance"). What was true then is even more true today. The issue is recurring yet remains unresolved. *See Kansas v. Kleypas*, 40 P.3d 139 (Kan. 2001), *petition for cert. filed* (U.S. May 3, 2002) (No. 01-10105) (seeking review on whether state courts may consider unadjudicated offenses in capital sentencing phase). It deserves review.

Instead of challenging the petition on these grounds, respondent primarily opposes review on the theory that the Ohio Supreme Court corrected any error in the lower state courts. (Resp. 8.) That view, however, does not answer the Ohio Supreme Court's own error when it concluded that the "Ritchey offense was part of Fox's social history and background and reflected upon his character." (Pet. App. 108a.) No other part of the Ohio Supreme Court's decision

can, or does, change this part of the decision. Even respondent, to its credit, agrees that the issue is appropriate for review under Mr. Fox's reading of the state courts' decisions. (*See* Resp. 9 ("if those courts had said that . . . other incidents could and should be thrown into the mix" during the weighing phase, "then the fourth question might warrant a closer look").)

CONCLUSION

The petition should be granted.

Respectfully submitted,

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